

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER

Chairman

WILLIAM A. MUNDT, Arizona Corporation Commission

Commissioner

JEFF HATCH-MILLER

Commissioner

MIKE GLEASON

Commissioner

KRISTIN K. MAYES

Commissioner

DOCKETED

DEC 10 2003

DOCKETED BY

2003 DEC 10 P 4: 51

AZ CORP COMMISSION  
DOCUMENT CONTROL

IN THE MATTER OF THE  
COMPLAINT OF ESCHELON  
TELECOM OF ARIZONA, INC.  
AGAINST QWEST CORPORATION

Docket No.: T-01051B-03-0668

JOINT STATEMENT OF  
UNDISPUTED FACTS

Pursuant to the request of the Administrative Law Judge, the parties stipulate that the following facts are undisputed:

1. Qwest provides UNE-Star to both Eschelon and McLeod pursuant to amendments to Qwest's interconnection agreements with Eschelon and McLeod respectively. UNE-Star for Eschelon is referred to as UNE-E. UNE-Star for McLeod is referred to as UNE-M.
2. All of the amendments cited herein were filed with and approved by the Arizona Corporation Commission, are a matter of public record, and are part of the record of this case.
3. The initial UNE-Star amendment for McLeod, dated October 26, 2000, provided for a monthly recurring rate of \$30.80 and had a termination date of December 31, 2003. (Complaint, Exhibit 2).
4. The initial UNE-Star amendment for Eschelon, dated November 15, 2000, provided for a monthly recurring rate of \$30.80 per month and had a termination date of December 31, 2005. (Complaint, Exhibit 3).
5. Eschelon and Qwest entered into two amendments to their UNE-Star agreement on July 31, 2001. One of those amendments provided for the availability of Advanced

1 Intelligent Network ("AIN") features and directory listings at a flat rate derived  
2 from the weighted average retail rates for the features, based on Eschelon's specific  
3 market penetration for the features ("AIN Amendment"). The AIN Amendment  
4 increased Eschelon's rate for each UNE-Star line in Arizona by \$.35 to \$31.15 per  
5 month, regardless of whether the individual line uses the AIN features or listings.  
6 (Complaint, Exhibit 4).

7 6. All the features included in Eschelon's AIN Amendment are available to McLeod  
8 from the regular retail tariff, and are provided to McLeod when requested for a  
9 particular line. There are no features provided to Eschelon per the AIN  
10 Amendment that are not provided to McLeod pursuant to the retail tariff. (Qwest  
11 Response to ESCH 02-001).

12 7. A second amendment between Eschelon and Qwest agreed to on July 31, 2001,  
13 established non-recurring charges for UNE-E, and included the availability of  
14 Custom Call Management System ("CCMS Amendment"). The CCMS  
15 Amendment did not affect the recurring charges for UNE-E.

16 8. McLeod has not entered into an AIN amendment or a CCMS amendment.

17 9. The differences between the UNE-M and UNE-E agreements at the time this  
18 dispute arose were:

19 a. They have different termination dates: UNE-M expires 12/31/03;  
20 UNE-E expires 12/31/05.

21 b. They are tied to different volume commitments: McLeod has agreed  
22 to maintain at least 275,000 lines, while Eschelon has agreed to  
23 maintain at least 50,000 lines.

24 c. UNE-E includes CCMS (Custom Call Management System), which  
25 allows Eschelon to have centrex-like feature functionality on a 1FB  
26 POTS line.

27 d. The UNE-E monthly recurring rate includes a rate of \$.35, which is  
28 for additional features and listings. UNE-M does not have this

1 feature rate included in the monthly recurring rate; although the same  
2 features and listings are available when requested from the retail  
3 tariff.

4 10. Qwest and McLeod entered into an amendment, effective September 20, 2002,  
5 which reduced McLeod's recurring rate from \$30.80 per month to \$20.61 per  
6 month in Arizona.

7 11. On October 29, 2002, Eschelon sent a letter to Qwest requesting to opt-in to the  
8 reduced McLeod rate. Qwest responded in a letter dated November 8, 2002. This  
9 was followed by additional correspondence and a telephone meeting. The written  
10 correspondence between the parties is a part of the record.

11 12. On September 11, 2003, Eschelon filed the Complaint that is the subject of this  
12 Docket.

13 13. On September 29, 2003, Eschelon and Qwest entered into an amendment that  
14 reduced Eschelon's rate to \$20.96 per month, consisting of the McLeod rate plus  
15 \$.35, for the period of October 1, 2003 to December 31, 2003. After that date, per  
16 the amendment, the Eschelon rate will revert back to the previous rate of \$31.15  
17 per month until the termination date of the Eschelon agreement, which is  
18 December 31, 2005. (Answer, Exhibit C).

19 For convenience of reference, the initial correspondence between the parties is  
20 attached as Exhibits A – D. Also attached are the recent Order of the Minnesota  
21 Commission (Ex. E) and the CCMS Amendment between Qwest and Eschelon (Ex. F).

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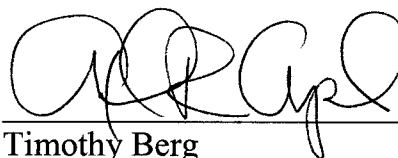
1 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of December, 2003.

2 LEWIS & ROCA LLP

FENNEMORE CRAIG

3  
4 

5 Thomas H. Campbell  
6 Michael T. Hallam  
7 40 N. Central Avenue  
8 Phoenix, Arizona 85004



Timothy Berg  
Theresa Dwyer  
Al Arpad  
3003 N. Central Avenue, Suite 2600  
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(602) 916-5000

9 Attorneys for Eschelon Telecom of  
10 Arizona, Inc.

-and-

11 Todd L. Lundy  
12 QWEST CORPORATION  
13 1801 California Street, Suite 4900  
14 Denver, Colorado 80202

Attorneys for Qwest Corporation

15 ORIGINAL +13 copies filed this  
16 10<sup>th</sup> day of December, 2003:

17 Docket Control  
18 ARIZONA CORPORATION COMMISSION  
19 1200 West Washington  
20 Phoenix, AZ 85007

21 COPY hand-delivered this 10<sup>th</sup> day of December, 2003:

22 Chris Kempley, Chief Counsel  
23 Legal Division  
24 ARIZONA CORPORATION COMMISSION  
25 1200 West Washington  
26 Phoenix, AZ 85007

27 Lyn Farmer, Chief Administrative Law Judge  
28 Hearing Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington  
Phoenix, AZ 85007

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Ernest Johnson, Director  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington  
Phoenix, AZ 85007



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PHX/1490918

**EXHIBIT**

**A**



October 29, 2002

By facsimile and prepaid overnight express service

R. Steven Davis  
Senior Vice President, Policy and Law  
and Deputy General Counsel  
Qwest Corporation  
1801 California Street  
Denver, CO 80202  
(303.992.1724)

Heidi Higer  
Director Interconnection Compliance  
Qwest Corporation  
1801 California Street, Suite 2410  
Denver, CO 80202  
(303.965.4667)

Re: Opt-In Request

Dear Mr. Davis and Ms. Higer:

Pursuant to Section 252(i) of the Telecommunications Act of 1996, Eschelon Telecom, Inc. requests that the pricing terms listed below from the recent Interconnection Agreement Amendment between Qwest Corporation and McLeodUSA, concerning UNE-P, be made available to Eschelon.

On or about September 19 or 20, 2002, Qwest filed, with the state commissions, an Amendment to its Interconnection Agreement with McLeod, for approval under Section 252(e). Page 2 of that Amendment (attached) replaced a portion of Attachment 3.2 of the McLeod/Qwest Amendment dated October 26, 2000. Eschelon requests to opt-in to page 2 of the amendment to Attachment 3.2 of the Qwest-McLeod Interconnection Agreement, consisting of Platform recurring rates that are effective from September 20, 2002, until December 31, 2003. (See attached.)

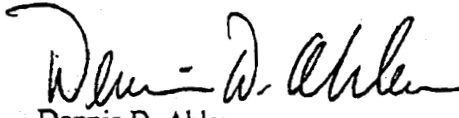
Eschelon requests that page 9 of Attachment 3.2 of Eschelon's Interconnection Agreement Amendment terms with Qwest, dated November 15, 2000, be amended to add the rates in the attached page from the McLeod Amendment to the end of the "Platform

R. Steven Davis  
Heidi Higer  
October 29, 2002  
Page 2

recurring rates" column, under the heading "Prices for Offering," and to indicate the specified time period within the term of the Eschelon Amendment that the McLeod Amendment rates apply (e.g., effective as of September 20, 2002), as noted on page 2 of the McLeod Amendment. Eschelon's request applies to the states of Minnesota, Utah, Colorado, Arizona, Washington, and Oregon.

Please respond to this request in writing on or before November 8, 2002.

Sincerely,



Dennis D. Ahlers  
Senior Attorney  
Eschelon Telecom, Inc.  
612.436.6249

cc: Qwest Law Department  
Attention: General Counsel, Interconnection  
1801 California Street  
Denver, CO 80202

Dr. Burl Haar  
Executive Secretary  
Minnesota Public Utilities Commission  
121 7<sup>th</sup> Place East, Suite 350  
St. Paul, MN 55101-2147

J. Jeffery Oxley  
Bill Markert



1  
\*\* TOTAL PAGE.03 \*\*

Platform recurring rates,  
effective on September 20, 2002 and ending December 31,  
2003:

AZ	\$ 20.61
CO	27.05
IA	22.47
ID	26.25
MN	24.50
MT	31.85
ND	22.54
NE	22.06
NM	26.86
OR	26.90
SD	28.45
UT	21.86
WA	21.16
WY	32.29

Apart from the foregoing, all other terms and conditions of the IA, as amended, including without limitation, the term thereof, shall remain unchanged and in full force and effect.

McLeodUSA Telecommunications  
Services, Inc.

Qwest Corporation

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Name Printed/Typed

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Name Printed/Typed

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

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Date

\_\_\_\_\_  
Date

**EXHIBIT**

**B**



November 8, 2002

Eschelon Telecom, Inc.  
Dennis D. Ahlers, Esq.  
Senior Attorney  
730 Second Avenue South  
Suite 1200  
Minneapolis, MN 55402

Dear Mr. Ahlers:

I am writing in response to your October 29, 2002 letter to Steve Davis and Heidi Higer regarding the interconnection amendments between Qwest Corporation ("Qwest") and McLeodUSA (the "McLeod Amendments") that were filed in September 2002. Your letter requests that pursuant to Section 252(i) of the Telecommunications Act of 1996 Eschelon's existing interconnection agreement with Qwest be amended to add the rates included in the amended interconnection agreements between Qwest and McLeod. Qwest takes seriously its obligations under the Act, including Section 252(i), and would be delighted to discuss further Eschelon's request, and to work with Eschelon to better meet its needs.

As you know, Section 252(i) permits a telecommunications carrier to request any individual service, interconnection or network element arrangement contained in any interconnection agreement that has been filed and approved by the state commission. Although neither the Act, nor the FCC's implementing regulations, require the requesting carrier to take the entire agreement between the ILEC and the initial CLEC, they likewise do not permit the requesting carrier to select among particular rates, terms and conditions applicable to an individual arrangement. Rather, the requests authorized under Section 252(i) are those for particular arrangements, including the terms and conditions applicable thereto, not individual provisions within those arrangements. Even if that language were ambiguous – which it is not – any doubt would be removed by the further language in Section 252(i) that requesting carriers receive individual arrangements "upon the same rates, terms and conditions" as the original party to the agreement. See 47 C.F.R. 51.809(a).

The rates in the McLeod agreement apply to the service offered pursuant to that agreement, not to the service offered in another agreement. In this regard, Qwest notes that the features and functions of the service that is the subject of the existing Qwest-Eschelon interconnection agreement differ in certain respects from the service that is the subject of Qwest's agreement with McLeod. For example, under its current agreement, Eschelon is provided CLASS features and additional types of directory listings. In

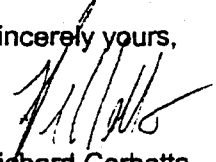
Eschelon Telecom  
Dennis Ahlers  
November 8, 2002  
Page 2

addition, as noted above, the express terms of Section 252(i) and the FCC Rule 51.809(a) condition Eschelon's right to receive the rates in the McLeod agreement on Eschelon's agreement to the same terms and conditions. This would include, for example, the volume commitments set forth in section 2.3 of the Qwest-McLeod interconnection agreement and its December 31, 2003 termination date.

~~We are unable to ascertain from your letter (a) whether Eschelon understands that the service it would be receiving if it chose to opt-in to the McLeod agreement would differ from the service it is receiving today, and (b) whether Eschelon would agree to the same terms and conditions to which McLeod has agreed. If so, please contact Larry Christensen, at 303-896-4686, to initiate the necessary arrangements, including appropriate contractual amendments. Qwest will act expeditiously to accommodate any such request.~~

Please do not hesitate to contact me should you have any other questions.

Sincerely yours,

  
Richard Corbetta  
Corporate Counsel  
Qwest Law Department

cc: Dr. Burl Haar  
Executive Secretary  
Minnesota Public Utilities Commission  
121 7<sup>th</sup> Place East, Suite 350  
St. Paul, MN 55101-2147

J. Jeffery Oxley  
730 Second Avenue South  
Suite 1200  
Minneapolis, MN 55402

Bill Markert  
730 Second Avenue South  
Suite 1200  
Minneapolis, MN 55402

Steven Davis  
Heidi Higer

**EXHIBIT**

**C**

ARIZONA

DOCKET NO. T-01051B-03-0668

ESCHELON 01-007

ATTACHMENT E



January 16, 2003

Richard L. Corbetta  
Senior Attorney  
Qwest Corporation  
1801 California Street, Suite 3800  
Denver, CO 80202

RE: McLeod Amendments

Dear Mr. Corbetta:

On November 8, 2002, you responded to a request by Eschelon, contained in an October 29, 2002, letter to "opt-in" to the McLeod Amendments that were filed in September of 2002. Specifically, Eschelon requested to opt-in to page 2 of the Amendment to Attachment 3.2 of the Qwest/McLeod Amendment, which consisted of platform recurring rates that are effective from September 20, 2002, until December 31, 2003. You responded, in part, by stating that, in effect, Qwest would not agree to Eschelon's request unless Eschelon agreed to adopt all of the terms and conditions in the McLeod agreement. Eschelon interpreted your response to be a rejection of the request made in our October 29, 2002, letter. However, Mr. Andrew Crain of Qwest, in a letter to the Arizona Corporation Commission, dated December 16, 2002, states that "Qwest did not deny Eschelon's request. Rather Qwest noted that the opt-in would have to comply with the applicable law."

Eschelon is unsure how to interpret Mr. Crain's statement in light of the exchange of letters. Certainly Mr. Crain was not claiming that Qwest is prohibited by law from allowing Eschelon to opt-in to those provisions requested. My thought was that he was simply stating that Qwest will only do what the law requires it to do, and the law does not require it to accept Eschelon's request. However, that would be a denial of Eschelon's request under anyone's definition. Nevertheless, since Mr. Crain states quite clearly that Qwest did not deny Eschelon's request, I am following up to see if we can determine to what extent Eschelon's request can be honored.

You state in your letter of November 8, 2002, that Qwest is unable to ascertain whether Eschelon understands that the service it would be receiving if it chose to opt-in to the McLeod agreement would differ from the service it is receiving today. Again, our request was quite specific and quite limited. However, so that Eschelon can understand its options, please explain in detail how the service that Eschelon would be receiving if it

730 Second Avenue South • Suite 1200 • Minneapolis, MN 55402 • Voice (612) 376-4400 • Facsimile (612) 376-4411

**voice data internet equipment**

Mr. Richard L. Corbetta  
January 16, 2003  
Page Two

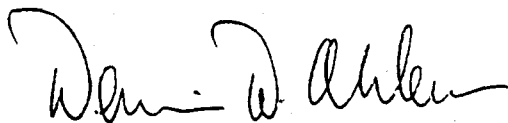
chose to opt-in to the McLeod Amendment as Qwest would allow it, would differ from the service it is receiving today. In your response, please reference the section of the McLeod or Eschelon agreement/amendment to which you are referring and please provide a copy of the applicable McLeod agreement so that we may compare the documents.

In your response you state that "the features and functions of the service that is the subject of the existing Qwest-Eschelon interconnection agreement differ in certain respects from the service that is the subject of Qwest's agreement with McLeod." As an example you state that Eschelon is provided "CLASS features and additional types of directory listings." Although you don't explicitly state it, I assume from this statement that McLeod is not provided CLASS features under its agreement with Qwest. Is that correct? Please provide a copy of the McLeod agreement and a reference to the portion that addresses this issue. Also specifically delineate those "additional types of directory listings" that would not be available under the McLeod contract.

Finally, you state that Eschelon's right to receive rates in the McLeod agreement is conditioned on Eschelon's agreement to the same terms and conditions as McLeod. To the extent not addressed above, please specify which terms and conditions in the McLeod agreement would apply to Eschelon should it opt-in to the McLeod Amendment in question.

Thank you in advance for your cooperation.

Sincerely,



Dennis D. Ahlers  
Senior Attorney  
Eschelon Telecom, Inc.  
612.436.6249

**EXHIBIT**

**D**





Qwest  
1801 California Street, Suite 3800  
Denver, Colorado 80202  
Phone 303 672-2974  
Facsimile 303-295-6973

Blair Rosenthal  
Corporate Counsel

ARIZONA  
DOCKET NO. T-01051B-03-0668  
ESCHELON 01-007  
ATTACHMENT C

February 14, 2003

Mr. Dennis D. Ahlers  
Eschelon Telecom, Inc.  
730 Second Avenue South, Suite 1200  
Minneapolis, MN 55402

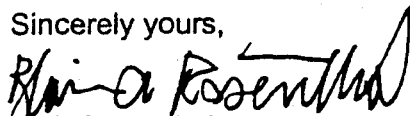
Dear Dennis:

This letter is in response to your January 16, 2003 letter to Rich Corbetta initiating additional questions about your request to opt-in to the McLeod Amendment. Please note that I have assumed Rich's responsibilities. It is unfortunate that Eschelon interpreted Rich's earlier letter as a rejection of Eschelon's opt-in request. Qwest will allow Eschelon to obtain the McLeod rates, but to obtain the rates, Eschelon must also opt-in to the same service (and associated terms and conditions) to which those McLeod rates apply. As indicated in our earlier response, Qwest was not able to determine from your request whether Eschelon in fact intended to change the service offering Qwest currently provides Eschelon.

Though I am sure you must already have a copy of the McLeod Amendments by the nature of your request, I can send you a copy of the Amendments if you would like. If you compare those Amendments to your current Agreements, you will readily see numerous differences.

I suggest that after you have reviewed the agreements, and assuming you wish to continue to pursue the opt-in request, we would be happy to set up a call to discuss the specific issues of your request. Once again, please contact Larry Christensen, Director - Interconnection Agreements, on 303-896-4686 to initiate a meeting.

Sincerely yours,

  
Blair Rosenthal  
Corporate Counsel

BCC Larry  
Christensen

**EXHIBIT**

**E**

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye  
Marshall Johnson  
Ken Nickolai  
Phyllis A. Reha  
Gregory Scott

DEC 2

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Complaint of Eschelon  
Telecom of Minnesota, Inc. Against Qwest  
Corporation Inc.

ISSUE DATE: December 1, 2003

DOCKET NO. P-421/C-03-627

ORDER PERMITTING OPT-IN AND  
REQUIRING REFUND

**PROCEDURAL HISTORY**

On April 23, 2003, Eschelon Telecom of Minnesota, Inc. (Eschelon) filed a complaint against Qwest Corporation, Inc. (Qwest) alleging, among other things, that Qwest was charging Eschelon higher rates for UNE-Star than it charges McLeodUSA (McLeod), and that Qwest's refusal to make UNE-star available to Eschelon at the same rate it is provided to McLeod was contrary to the parties' Interconnection Agreement (ICA) and Minnesota statutes (the Opt-In Issue).<sup>1</sup>

On June 2, 2003, the Commission's NOTICE AND ORDER FOR HEARING referred the matter to the Office of Administrative Hearings for contested case proceedings.

On July 15, 2003, Qwest filed a motion for summary judgement with the Administrative Law Judge (ALJ) requesting that Eschelon's opt-in request and claim for damages be rejected, that Eschelon's request be treated as a request for negotiation,<sup>2</sup> and that a process be set up for negotiating or arbitrating Eschelon's request.

On July 15, Eschelon filed its initial brief.

On August 7, 2003, the Department of Commerce (DOC) filed a response, Qwest filed reply comments, and Eschelon filed a reply brief.

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<sup>1</sup> The complaint also alleged that Eschelon is entitled to a refund of payments for private lines that should have been available to Eschelon as combinations of unbundled network elements known as EELs. This issue will not be addressed in this Order.

<sup>2</sup> Pursuant to 47 U.S.C. § 251(c)(1) and the dispute resolution process contained in the parties' ICA.

On September 4, 2003, the ALJ issued her Recommendation that: a) Qwest's motion for summary disposition be denied, b) Eschelon may opt into the pricing portion of the Qwest/McLeod ICA, but only for the duration of the agreement with McLeod, and b) the Commission has the authority to require Qwest to provide a refund to Eschelon for the lower rate from the date of Eschelon's request.

On September 19, 2003, Eschelon requested that the Opt-In Issue addressed in the September 4, 2003, recommendation of the ALJ be bifurcated from the remaining issues in this docket. There was no objection to Eschelon's request.

On October 2, 2003, the ALJ issued an Order granting bifurcation of the Opt-In Issue addressed in her September 4, 2003 recommendation from the remaining issues in this docket. The Opt-In issue was forwarded to the Commission for consideration.

On November 4, 2003, Qwest filed comments regarding the ALJ's September 4, 2003, recommendation.

On November 12, 2003, Eschelon filed a motion to strike Qwest's comments as untimely.

On November 13, 2003, the matter came before the Commission.

## **FINDINGS AND CONCLUSIONS**

### **I. Eschelon's Complaint and Background**

#### **A. The Complaint**

Eschelon alleged that Qwest refused to give it the same UNE-Star rates that Qwest made available to McLeod unless Eschelon agreed to all other terms and conditions of the Qwest/McLeod Amendment to their ICA. These terms and conditions would require that Eschelon take the same volume requirements, service limitations and termination date as McLeod.

#### **B. Background**

The Telecommunications Act of 1996 (the Act)<sup>3</sup> was enacted to foster competition in local telephone service. It imposed certain requirements on incumbent local exchange carriers (ILECs), such as Qwest, to facilitate competing telecommunications carriers entering the market. One of the Act's provisions requires that an ILEC make available to any other carrier the services it provides under a negotiated ICA, under certain conditions. A competing carrier may exercise this opt-in right without further negotiation and may "pick and choose" from the services offered as long as the carrier selects the service under the same terms and conditions set forth in the agreement.<sup>4</sup>

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<sup>3</sup> Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

<sup>4</sup> 47 U.S.C. § 252 (i).

In 1999 Eschelon and Qwest entered into an ICA<sup>5</sup> which was subsequently amended November 15, 2000. This amendment provided for Eschelon to purchase UNE-Star at the rate of \$27.00 per month in Minnesota. This amendment was to expire on December 31, 2005.

In September of 2002, Qwest and McLeod entered into an amendment to their ICA, which changed the pricing of UNE-Star for McLeod. It provided for a reduction of the UNE-Star rate to McLeod from \$27.00 per month to \$24.50 per month. The amendment provided that the applicable rate would revert to the previous rate of \$27.00 per month after December 31, 2003.

In an October 29, 2002 letter to Qwest, Eschelon requested to opt-in to that part of the Qwest/McLeod ICA "...consisting of Platform recurring rates that are effective from September 20, 2002, until December 31, 2003."

At hearing, Qwest and Eschelon informed the Commission that they had filed an amendment to their ICA reflecting their agreement that Eschelon will pay \$24.85<sup>6</sup> per month for UNE-Star for the period from October 1 through December 31, 2003. After December 31, 2003, the UNE-Star rate to Eschelon will revert back to the previous \$27.00 per month rate.

However, Qwest and Eschelon indicated that they did not reach agreement on the issue of whether Eschelon was entitled to receive the reduced rate of \$24.85 retroactive to the date of Eschelon's request to opt-in.

## **II. Positions of the Parties**

### **A. Eschelon**

Eschelon stated that immediately after McLeod and Qwest entered into an amendment of their ICA, which amended the pricing of UNE-Star for McLeod, Eschelon asked Qwest to give it the same UNE-Star rates as those made available to McLeod.<sup>7</sup> It argued that under Eschelon's ICA with Qwest, Qwest was required to provide network elements to Eschelon at rates, terms and conditions no less favorable than those provided to itself or any other party. Further, it argued that the Telecommunications Act of 1996, in 47 U.S.C. § 252(i), provides that Qwest must provide network elements to Eschelon at the same rates, terms and conditions as it provides to McLeod.

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<sup>5</sup> The ICA was approved by the Commission on October 4, 1999 in Docket No. P-5340,421/M-99-1223.

<sup>6</sup> The \$24.85 per month rate to Eschelon reflects the McLeod rate of \$24.50 plus \$.35 for Advanced Intelligence Network (AIN) features that Eschelon purchases beyond those purchased by McLeod.

<sup>7</sup> Eschelon agreed that its UNE-Star rate should be 35 cents more than the rate to McLeod due to the agreed-to charge for access to AIN features.

Eschelon stated that Qwest would not allow Eschelon to receive the rate given to McLeod without Eschelon also accepting the termination date in the McLeod agreement and other conditions, including volume requirements. Eschelon argued that it was only required to take the terms and conditions that were legitimately related to the requested part of the agreement and that neither the termination date nor volume requirements were tied to the UNE-Star rates. For this reason Eschelon argued that it should receive the lower UNE-Star rates until December 31, 2005, the expiration date of its UNE-Star amendment to the ICA. In the alternative, Eschelon argued that it should be entitled to UNE-Star at the McLeod rate for the same period of time McLeod is entitled to the lower rate.

Finally, Eschelon argued that, contrary to Qwest's assertion, Eschelon was not asking for damages, but rather was asking that its request for nondiscriminatory rates be honored from the date of its request.

#### **B. Qwest**

Qwest argued that Eschelon's claim related to the McLeod pricing and its claim for money damages should be dismissed. It argued that although Eschelon had the right to opt-in to the Qwest/McLeod agreement, Eschelon was required to take all terms and conditions that were reasonably related to the terms that were being sought. In this case, Qwest argued that Eschelon was required to accept the expiration date of the McLeod pricing agreement and the volume commitments contained in the agreement.

Qwest argued that because Eschelon has rejected critical terms of the McLeod agreement, it was not seeking to opt-in. Rather, Eschelon was seeking to negotiate an amendment to its ICA pursuant to 47 U.S.C. § 251(c)(1) and the parties' ICA. For this reason, Qwest argued that the Commission should direct the parties to negotiate an amendment to their ICA.

Finally, Qwest argued that the Commission does not have the authority to award retroactive money damages as requested by Eschelon nor is Eschelon entitled to a retroactive refund. Qwest argued that the lower price to McLeod was legitimately related to the duration of the agreement and Eschelon must accept the term if it wants the price.

Since Eschelon refused to agree to the expiration date, Eschelon's claim for a retroactive award is invalid.

#### **C. DOC**

The DOC argued that Eschelon is entitled to the same reduction in price as McLeod received for UNE-Star. It argued that Federal Communication Commission (FCC) rules<sup>8</sup> allow Eschelon to pick and choose provisions from ICAs of other competitive local exchange carriers (CLECs) unless Qwest can prove that the costs of providing the service to Eschelon are greater than the costs of providing it to the original carrier. It argued that Qwest has not met this burden.

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<sup>8</sup> 47 C.F.R. §51.809.

However, the DOC agreed with Qwest that Eschelon should be bound by the duration of the price reduction to McLeod. Therefore, Eschelon should receive the benefit of the reduced pricing until the stated December 31, 2003 expiration date, or longer if the agreement provides for it.

The DOC also argued that since Eschelon established that Qwest improperly provided McLeod more favorable pricing than Eschelon, the Commission has the authority to order a retroactive refund. It argued that the lower rate to Eschelon should be deemed effective as of the date Eschelon first requested to adopt that rate, and for the remainder of the term of the McLeod amendment or for as long as McLeod continues to benefit from that rate.

### **III. The ALJ's Findings and Recommendations**

The ALJ made the following findings and recommendations:

- A. That the Commission deny Qwest's motion for Summary Judgement. The ALJ found that Eschelon properly asserted a claim for the denial of its opt-in rights under the Telecommunications Act of 1996, and that the Commission has the authority to resolve the claim.
- B. That Eschelon may opt into that portion of the ICA between Qwest and McLeod providing for a price of \$24.50 for UNE-Star services, but only for the duration of the agreement with McLeod.
- C. That the Commission has the authority to require Qwest to provide a refund to Eschelon for the lower rate from the date of Eschelon's request.

The ALJ found that Eschelon properly asserted a claim that Qwest violated Eschelon's opt-in rights. The ALJ stated that the issue for the Commission was whether there were any terms that were legitimately related to the price Qwest gave McLeod, or whether Eschelon is entitled to the lower rate without additional terms.

Further, the ALJ found that there was a significant difference between Eschelon locking in the lower McLeod rate for the same duration as McLeod and Eschelon locking in that rate for a longer period. If the rate was locked in for Eschelon for a longer period than for McLeod, it would be more advantageous to Eschelon than McLeod. Thus, the ALJ found that Qwest should be required to offer the lower rate to Eschelon for the same period of time that McLeod was to receive the lower rate. The ALJ found that the record clearly demonstrated that the lower UNE-Star rate was legitimately related to the duration of the McLeod agreement.

However, the ALJ found that the other terms that Qwest would require Eschelon to adopt were not legitimately related to the lower price negotiated between Qwest and McLeod and were not required to be identical.

The ALJ also found that the Commission's authority includes establishing reasonable rates and prices. Minn. Stat. § 237.081, subd. 4. The ALJ found that it follows that if Qwest improperly denied service to Eschelon for the time that Eschelon requested it, and the Commission determines that a lower price was required, the Commission could require Qwest to amend its past billing to reflect the lower rate. This would result in a refund or credit to Eschelon. To hold otherwise would give an incumbent local exchange carrier an incentive to delay granting an opt-in request.

#### **IV. Commission Action**

The Commission concurs in the ALJ's finding that Eschelon has properly asserted a claim that its opt-in rights were violated by Qwest. The Commission, therefore, will deny Qwest's request for summary judgement.

The Commission also agrees with the ALJ and the DOC that Eschelon is entitled to the price reduction given to McLeod, but only for the time period that the rates are available to McLeod. This is just and reasonable under the circumstances. The Commission finds that the record supports that the duration of the McLeod agreement was legitimately related to the lower UNE-Star rate that Qwest and McLeod agreed upon. The amendment between Qwest and McLeod clearly sets forth that after December 31, 2003, the reduced rate to McLeod will revert back to the original \$27.00 rate. To give the lower rate to Eschelon for the duration of the Eschelon/Qwest ICA would give Eschelon an advantage over McLeod and defeat the time limitation negotiated between Qwest and McLeod.

For the above reasons, the Commission will allow Eschelon to opt into the part of the ICA between Qwest and McLeod that provides for a price of \$24.85 for UNE-Star services through December 31, 2003. The parties have agreed that Eschelon may receive the lower rates from October 1, 2003 through December 31, 2003.

Finally, The Commission finds that Qwest was required to provide the lower rate of \$24.85 from the date that Eschelon made its first request to opt-in, that is October 29, 2002. Qwest improperly denied Eschelon the lower rate for the period after this date. Therefore the Commission will order Qwest to provide a refund to Eschelon to reflect the lower rate from October 29, 2002. This retroactive relief will correct Qwest's improper denial of Eschelon's proper request for the rate given to McLeod. Without such relief to Eschelon, incumbent local exchange carriers such as Qwest would have an incentive to delay granting opt-in requests.

The Commission will so order.

#### **ORDER**

1. Qwest's motion for summary judgement is denied.
2. The Commission concurs in and adopts the findings, conclusions and recommendations of the ALJ.
3. Eschelon may opt into that portion of the interconnection agreement between Qwest and McLeod providing for UNE-Star services at a price of \$24.85 for the duration of the agreement with McLeod.
4. Eschelon and Qwest shall file an amendment to their interconnection agreement within 30 days of the date of this Order.
5. Qwest shall provide a refund to Eschelon for the lower rate from the date of Eschelon's request, October 29, 2002, within thirty days of this Order.



6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

A handwritten signature in dark ink, appearing to read "Burl W. Haar", is written over the printed name.

Burl W. Haar  
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

**EXHIBIT**

**F**

**Amendment No. \_\_\_\_\_ to the Interconnection Agreement  
Between Eschelon Telecom, Inc.  
and Qwest Corporation  
in the State of ARIZONA**

This Amendment No. ("Amendment") is made and entered into by and between Eschelon Telecom, Inc. ("Eschelon") and Qwest Corporation, formerly U S WEST Communications, Inc. ("Qwest"). Eschelon and Qwest may be referenced through this Amendment as the "Parties."

**Recitals**

WHEREAS, Eschelon and Qwest entered into that certain Interconnection Agreement for service in the state of ARIZONA, which was approved by ARIZONA Commission on 4-28-00 (the "Agreement"); and

WHEREAS, Eschelon and Qwest wish to amend the Agreement under the terms and conditions contained herein.

NOW THEREFORE, the Parties agree to the following:

**Amendment**

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

**1. Amendment Purpose.**

This Amendment is for the purpose of amending the Agreement to establish the Non-recurring charges for Unbundled Network Element Platform ("UNE-P").

**2. Amendment Terms**

2.1 The Agreement is amended by adding the following additional paragraphs:

**Non-Recurring Charges for Eschelon UNE-P.**

2.1.1. **Definitions.** For purposes of this Amendment, "class of service" will refer to one of the following three classes of service:

(a) 1FB, including when ordered with Customer Calling Management System ("CCMS") (i.e., the ordering of CCMS with 1FB does not constitute a change of class of service from 1FB with or without CCMS for billing purposes, so the charge does not apply).

(b) Centrex 21.

(c) Centrex+/Centron (including Centron Standard Station, Centron Basic Station, Centron Feature Package, and Centron Optional Features).

**2.1.2. Conversion of End User Customer With Existing Service to Eschelon UNE-P lines.** If an end user with existing class of service selects Eschelon as its provider, Eschelon will pay a non-recurring charge of \$ 7.60 for the first UNE-P line and \$1.43 for each additional UNE-P line to serve the end user at the same service address with the same class of service. Separate end users at the same service address, if any, each will be subject to separate non-recurring charges, if applicable.

**2.1.3. Provisioning of UNE-P Where there is no Existing Service or Where there is a Change in Class of Service.** When Eschelon orders a UNE-P line to serve an end user where there is no existing service, where there is no existing service of the same class of service, or where the number of UNE-P lines ordered by Eschelon is greater than the number of existing lines of the same class of service at the same service address, Eschelon will pay a non-recurring charge of \$69.00 for the first new UNE-P line and \$17.75 for each additional new UNE-P line located at the same service address and ordered at the same time, provided these charges do not exceed commission approved rates. Separate end users at the same service address, if any, each will be subject to separate non-recurring charges, if applicable. The ordering of CCMS with 1FB does not constitute a change of class of service from UNE-P on a 1FB line for billing purposes, so the charge does not apply.

**2.1.4. Subsequent Ordering of Feature Changes or Additional Features.** When Eschelon orders either a change features (excluding deletions) or additional features for an Eschelon end user provisioned through UNE-P after the initial installation of UNE-P lines, for each UNE-P line to which an additional feature is subsequently added on the same class of service, Eschelon will pay a non-recurring charge of \$7.60 for the first feature and \$1.43 for each additional feature. Separate end users at the same service address, if any, each will be subject to separate non-recurring charges, if applicable.

**2.1.5. Effective Date of Rates.** The rates set forth on herein shall be effective as of September 1, 2001.

**2.2** The Agreement is amended by adding the following additional paragraph:

**Features available with UNE-P**

Exhibit A to Amended Attachment 3.2 (copy attached) sets forth features which are available, in all forms of that feature, with UNE-P, as well as on which platform they are available. The list of features set forth in Exhibit A is not exclusive. Qwest will make additional features available to Eschelon with UNE-P, as they are, or become, available, at appropriate non-recurring rates, if any.

**3. Effective Date**

This Amendment shall be deemed effective upon approval by the *Arizona Corporation* Commission; however, the Parties agree to implement the provisions of this Amendment upon execution.

#### 4. Further Amendments

Except as provided in this Amendment, the provisions of the Agreement (as previously amended) shall remain in full force and effect. Except as provided in the Agreement, this Amendment may be further amended or altered only by a written instrument executed by an authorized representative of both Parties.

The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

Eschelon Telecom, Inc.

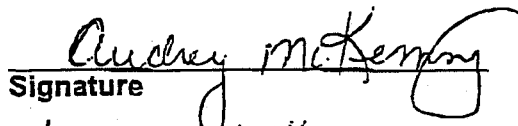
  
Signature

Richard A. Smith  
Name Printed/Typed

President and COO  
Title

July 31, 2001  
Date

Qwest Corporation

  
Signature

Audrey McKenney  
Name Printed/Typed

SVP - Wholesale Markets  
Title

July 31, 2001  
Date

## EXHIBIT A

Features Available On Various Service Platforms And Included In The Flat Rated UNE-P Business Recurring Charge (except as noted below)

	1FB POTS	1FB POTS w/CCMS	CTX21	Centron	Centrex *
Call Hold (Hard)		X	X	X	X
Consultation Hold (Soft)		X	X	X	X
Call Transfer	X	X	X	X	X
3-Way Calling	X	X	X	X	X
Call Pickup (Group and Station)		X	X	X	X
Call Waiting/Cancel Call Waiting	X	X	X	X	X
Distinctive Ring	X	X	X	X	X
Speed Call Long - Customer Change	X	X	X	X	X
Station Dial Conferencing (6-way)		X	X	X	X
Call Fwd Busy Line	X	X	X	X	X
Call Fwd Busy Line Expanded	X	X	X	X	X
Call Fwd Busy Line / Don't Answer	X	X	X	X	X
Call Fwd Don't Answer	X	X	X	X	X
Call Fwd Busy (External) Don't Answer	X	X	X	X	X
Call Fwd Busy (Overflow) Don't Answer	X	X	X	X	X
Call Fwd Busy External	X	X	X	X	X
Call Fwd Variable	X	X	X	X	X
Call Park			X	X	X*
MWI A/V	X	X	X	X	X
Centrex Management System (CMS)				X	X
Station Message Detail Recording (SMDR)				X	X
Hunting	X	X	X	X	X
Individual Line Billing	X	X	X	X	X
Intercept	X	X	X	X	X
Intrasystem Calling				X	X
Intercom				X	X
Night Service				X	X
Outgoing Trunk Queuing				X	X
Line Restrictions**				X	X
Touch Tone	X	X	X	X	X
AIDD	X	X	X	X	X
Dial 0				X	X
DID				X	X
DOD				X	X
Automatic Call Back Ring Again				X	X
Executive Busy Override				X	X*
Last Number Recall				X	X*
Make Set Busy				X	X
Network Speed Call				X	X*
Collect & 3rd Party Block	X	X	X	X	X
Custom Ringing	X	X	X	X	X
3-Way Call Blocking	X				
Business Complete a Call	X	X	X	X	X
Complete A Call Block	X	X	X	X	X
CLASS					
Anonymous Call Rejection	X	X	X	X	X
Call # Delivery Blocking (CID Blocking)	X	X	X	X	X
Call Trace Blocking	X	X	X	X	X
CID # only	X	X	X	X	X
CID Name & Number	X	X	X	X	X
CID on CV	X	X	X	X	X
Continuous Redial	X	X	X	X	X
Continuous Redial Blocking	X	X	X	X	X
Last Call Return	X	X	X	X	X
Last Call Return Blocking	X	X	X	X	X
Priority Calling	X	X	X	X	X
Selective Call Forwarding	X	X	X	X	X
Selective Call Rejection	X	X	X	X	X
Listings					
Primary Listing	X	X	X	X	X
Additional Listing (CLT)	X	X	X	X	X
Foreign Directory Listing (FAL)	X	X	X	X	X
If No Answer Listing (FNA)	X	X	X	X	X
Joint User Listing (JUL)	X	X	X	X	X
Non Listing No Change (NLE)	X	X	X	X	X
Non Listing (NLT)	X	X	X	X	X
Non Published No Change (NP3)	X	X	X	X	X
Non Published (NPU)	X	X	X	X	X
Extra Line Listing (XLL)	X	X	X	X	X
Change Listing, Business Client (LBS)	X	X	X	X	X

The Following Are Available At Retail Rates Not to Exceed Commission Approved Rates

AIN @ Retail					
Remote Access Forwarding (AFD)	X	X	X	X	X
Scheduled Forwarding (ATF)	X	X	X	X	X
Dial Lock (DCL)	X	X	X	X	X
Do Not Disturb (DNT)	X	X	X	X	X

\*New features that require special assembly will be assessed a one-time, cost-based special assembly charge not to exceed commission approved rates.

\*\*Existing quantities are grandfathered. New quantities will be billed at appropriate rates.